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No. 84-

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

PATRICIA CONTI and RICHARD CONTI,
husband and wife,

Petitioners

v.

FORD MOTOR COMPANY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Have Petitioners been denied their Seventh Amendment right to a jury trial by the Third Circuit's departure from the established principles of appellate review of jury verdicts.

2. Have Petitioners been denied their seventh amendment right to a jury trial by the Third Circuit's failure to fulfill its obligation under Rule 50(d) to consider whether the entry of judgment notwithstanding the verdict on the warning issue necessitated the granting of a new trial on the defective design issue.

LIST OF PARTIES

The caption of this Petition does not include Richard Conti as a third-party defendant.

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Patricia Conti and Richard Conti respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit entered on September 17, 1984.

I.

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit (App. A-1) is reported at 743 F.2d 195 (1984). The Court of Appeals' order denying Petitioner's Petition for Rehearing before the Court En Banc (App.

A-7) is unreported, but the denial is noted in the reported opinion. The memorandum of the District Court denying Respondent Ford Motor Company's post trial motions (App. A-8) is reported at 578 F. Supp. 1429 (E.D. Pa. 1983).

II.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on September 17, 1984. (App. A-1.) Petitioners timely filed a Petition for Rehearing En Banc, was denied on October 12, 1984. (App. A-7). This petition for certiorari was filed within ninety (90) days of the Order of the Court of Appeals denying Petitioners' Petition for Rehearing En Banc. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment of the Constitution of the United States provides:

> In suits at common law, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

III.

STATEMENT OF THE CASE

A. Proceedings Below.

Petitioners filed this action on May 26, 1981 in the United States District Court for the Eastern District of Pennsylvania against Ford Motor Company. Ford Motor

Company joined Petitioner Richard Conti as a third-party defendant. The District Court's jurisdiction was based on diversity of citizenship, 28 U.S.C. Section 1332.[1]

The Complaint alleged a defective design of the 1980 Ford Mustang as well as the inadequacy of a warning provided to the purchasers, the Contis. Ford Motor Company's third-party action alleged negligence on the part of Richard Conti.

A jury trial was conducted from January 4, 1983 through January 7, 1983. The jury announced its answers to special interrogatories on January 7, 1983. The jury found the 1980 Ford Mustang was not defectively designed, but that Ford Motor Company had given inadequate warning. Damages were awarded to Patricia Conti in the amount of $650,000., and to Richard Conti in the amount of $15,000. The jury found Richard Conti's negligence contributed to the accident by 75%. The trial judge directed entry of judgment in the amount of the verdicts.

Ford Motor Company filed timely motions for a judgment notwithstanding the verdict and for a new trial. The trial judge denied those motions by written opinion on September 23, 1983. (App. A-8)

Ford Motor Company took an appeal on all issues to the United States Court of Appeals for the Third Circuit. On September 17, 1984, the Third Circuit filed its opinion (App. A-1) reversing the trial court and remanding for entry of judgment notwithstanding the verdict in favor of Ford Motor Company. A timely Petition for Rehearing En Banc filed by the Petitioners was denied without opinion on October 12, 1984.

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1. Petitioners were citizens of Pennsylvania when the case was filed and Ford Motor Company is not a citizen of Pennsylvania and its principal place of business is not in Pennsylvania.

B. Facts

In February of 1980, the Petitioners purchased a 1980 Ford Mustang. On November 11, 1980, Patricia Conti was injured as she was entering the car. The car was equipped with a manual transmission. The car was parked in reverse gear, as directed in the Operator's Manual. Richard Conti was in the driver's seat. As Patricia Conti entered the car on the passenger side, Richard Conti turned on the ignition without depressing the clutch. The car started in reverse gear and bolted backward. The opened passenger door struck Patricia Conti and knocked her to the ground.

Richard Conti normally drove a car with an automatic transmission. Cars equipped with automatic transmissions will not start if the transmission selector lever is in forward or reverse. Prior to using a car with an automatic transmission, Richard Conti used a General Motors truck which had a manual transmission. General Motors' manual transmissions have a switch which prevents the vehicle from starting unless the manual transmission is in neutral or the clutch is depressed.

Although Richard Conti did not remember whether he had read the Mustang Operator's Manual, which instructed the driver as follows:

> "On manual transmission vehicles, depress the clutch pedal and place the gearshift lever in the NEUTRAL position, as starter will operate while selector is in any gear." (App. A-25)

he testified that he knew that "if you didn't depress the clutch it wouldn't start," i.e., he believed that if the clutch was not depressed, the car would not start.

The Operator's Manual includes 81 statements which are captioned as "Warning" or "Caution". See examples, App. A-26–A-35. These 81 items are also blocked

out from the rest of the text. The starting instruction previously quoted was not captioned as a warning or caution and was in no other way given emphasis.

Approximately 90% of cars in use in America are equipped with automatic transmissions. General Motors accounts for approximately 2.2% of the manual transmission sales. These cars have safety switches which prevent the starting of vehicles with manual transmissions except when the manual transmission is in neutral or the clutch is depressed. The balance of manual transmissions, including the 1980 Ford Mustang nanual transmission, do not have a safety switch. In these circumstances the public has developed a false sense of security about the risks involved in starting a manual transmission car.[2]

On these facts the jury responded to a special liability interrogatory that

> "Defendant, Ford Motor Company, is liable to plaintiff, Patricia Conti, *because of* inadequate warnings." (emphasis added).

On their own initiative, the jury admonished:

"We, the members of the jury, sincerely recommend Ford Motor Company should install inside the cab of their cars warnings and/or cautions stressing the possible dangers of not following the operator's instructions exactly. Also, it should put more warnings and/or cautions *in operator's manual.*" (emphasis added).

C. The Third Circuit Decision

The general proposition of Pennsylvania law stated by the Third Circuit was correct.

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2. Testimony of Robert Swint found at p. 62 of the Appendix in the Court of Appeals. Later references to that Appendix will be cited as C.A. App. A-19.

> "Where the theory of liability is failure to warn adequately, the evidence must be such as to support a reasonable inference, rather than a guess, that the existence of an adequate warning may have prevented the accident before the issue of causation may be submitted to the jury." (App. A-4)

In denying the motion for a judgment notwithstanding the verdict the trial court applied the same rule of law.

The Third Circuit found the evidence insufficient to present a jury question as to whether or not "additional warnings or reminders may have made a difference". (App. A-6) The court prefaced its analysis of the record with the telling observation: "As *we* read the record, there are no facts in dispute." (emphasis added; App. A-4)

The Third Circuit misread the record. For example, the court stated that Richard Conti drove standard transmission cars "on and off since 1955". The record establishes that prior to driving the 1980 Ford Mustang, he had driven either an automatic transmission car or a General Motors manual transmission with a neutral safety switch. He also testified that in 1955 he drove a standard transmission car which would not start unless the clutch was depressed. The court, on three occasions, stated Patricia Conti "lost her balance and fell", when the testimony was she was struck by the car and knocked down. These errors may not be dismissed as minor because only one other aspect of the record was considered by the court. Richard Conti testified he did not know why he failed to depress the clutch. The court then made its own interpretation of his testimony and concluded "Mr. Conti was no paying attention to what he was doing". All other relevant evidence was ignored by the court as was the trial court's comprehensive analysis of the causation issue.

From this selective and obvious misreading of the evidence the court concluded:

> [T]he jury's conclusion was based on mere speculation that if Mr. Conti's eyes had caught a sticker

> warning him to depress the clutch pedal as he was talking to his wife, he may have remembered to either shift the car to neutral or to disengage the clutch prior to starting the car. (App. A-6)

Contrary to the Third Circuit's analysis, Petitioners' primary theory was that the *Operator's Manual* did not contain adequate warning. The Court's error is exaccerbated by the Court's selective reference to the record. Petitioners as verdict winners were entitled to have the entire record considered, not part.[3]

The Third Circuit ignored the following aspects of the record:

> (i) uncontradicted testimony that the operator's manual instructed the operator to park the car in reverse gear. (C.A. App. 22, 32).
>
> (ii) uncontradicted testimony of the operator that he thought that if he "didn't depress the clutch it (the car) wouldn't start". (C.A. App. 46).
>
> (iii) uncontradicted testimony of the operator that he was "under the impression just before the accident that all standard transmission vehicles had to have their clutches depressed before the engine would turn over and start". (C.A. App. 49)
>
> (iv) uncontradicted *expert testimony* that the Ford Motor Company should have alerted the consumer by making "a clear and obvious indication this is a dangerous condition." (C.A. App. 72)
>
> (v) uncontradicted *expert testimony* that the indication should have been placed "clearly in the manual itself. . ." (C.A. App. 72)
>
> (vi) uncontradicted *expert testimony* that Ford Motor Company should have introduced "this feature to the operator who is. . . . .to study and read

3. See *Moores Federal Practice*, Vol 5A, Par. 50.02[1].

with other warnings and cautions. This should be in the same category. There are dangers associated with this. There are some incipient problems associated with it, recognized by the industry and. . . . .just like other safety features should be alerted to the operator." (C.A. App. 72)

(vii) uncontradicted *expert testimony* that having reviewed the manual in question the expert found that it was lacking such a warning and that, in fact, there was "no warning whatsoever regarding the safety aspects." (C.A. App. 73)

(viii) uncontradicted *expert testimony* that, as an alternative to placing the warning in the manual, the warning could be given to the operator in another form, to wit: "you could placard this, you could give him indications of various safety information as the car is delivered new to him. For example, there could be an attachment to the gear shift mechanism that he would have to remove that would indicate to him warning regarding the aspects of this device and how it should be used and allow him to be acknowledging that. . .and maintain his awareness of it." (C.A. App. 73)

REASONS FOR GRANTING THE WRIT

1. SUPERVISION OF THE COURT OF APPEALS' APPLICATION OF THIS COURT'S DECISIONS ESTABLISHING THE SCOPE OF APPELLATE REVIEW OF JURY VERDICTS IS NEEDED TO INSURE THAT THE SEVENTH AMENDMENT TO A JURY TRIAL IS PRESERVED.

Counsel for Petitioners recognizes that this Court "is not, and never has been, primarily concerned with the correction of errors in lower court decisions".[4] On the

4. Address by Mr. Chief Justice Vinson Before the American Bar Association, September 7, 1949, 69 Sup. Ct. V, VI (1949).

other hand, the Seventh Amendment's guarantee of a jury trial is all but hollow unless this Court on occasion corrects appellate courts which substantially intrude on the jury's function. This case may appear to be an "ordinary" case which is hardly "cert-worthy." It is the "ordinary" character of this case which makes it appropriate for review by this Court. The case is ordinary in the sense that it is a diversity personal injury-products liability action. This "ordinary" case however, presents an unfortunate and reoccurring propensity of the Third Circuit to manipulate the law-fact distinction in an effort to justify the substitution of the Court's interpretation of the evidence for that of the proper factfinder.[5]

The jury was properly charged on the warning issue and no objection was taken. The jury answered the special interrogatory holding Ford Motor Company "liable to the plaintiff, Patricia Conti, *because of* inadequate warnings." (emphasis added) The jury accepted the testimony of Richard Conti and was persuaded by the evidence that consumers as a class are not aware of the risks inherent in the Ford manual transmission and that the risks are not obvious. Yet, the Court of Appeals relied on its own reading of part of the record. The Third Circuit's Opinion offends the basic tenets of appellate review.[6]

The causation issue is whether the absence of an adequate warning contributed to the event which caused the injuries, an issue well within the province of the jury. The jury's answer in the affirmative and its unsolicited admonission that additional warnings be given, demon-

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5. Last term in *Patton v. Yount*, ____ U.S. ____, 104 S.Ct. 2885 (1984) this Court reversed the Third Circuit for mischaracterizing a finding made by a state and federal district court as one of law. There the issue involved the presumption accorded the factfinder under the habeas corpus statute. Here, the seventh amendment is at stake.

6. See e.g. *Brady v. Southern Railroad*, 320 U.S. 476 (1943); Wright & Miller, *Federal Practice and Procedure*, Vol. 9, Sec. 2524-2528 (West 1971).

strates unequivocally that the jury determined that the absence of an adequate warning contributed to the accident. At issue was a question of human behavior no different than that of motive, intent and countless other findings juries have traditionally made. Why is a three judge appellate panel better able to assess this fact?

Petitioners do not quarrel with the proposition set forth in *Greiner v. Volkswagenwerk,* 429 F.Supp. 495, 497 (E.D. Pa. 1977), that if the "remoteness of the casual connection . . . clearly appears" the plaintiff proximate cause claim is defeated. Nor do Petitioners quarrel with *Sherk v. Daisy Heddon,* 498 Pa. 594, 450 A.2d 625 (1982), which holds that misuse of a product precludes a finding of proximate cause. Neither case, so strongly relied by the Third Circuit, applies to the facts of this record. Misuse was not an issue in this case. Moreover, any suggestion of remoteness of the causal connection in this case must be rejected when juxtaposed to the record, the jury's finding and Judge Fullam's opinion on the Ford's post trial motions which concluded:

> "The evidence was also clearly sufficient to support the jury's finding that the absence of adequate warnings was a proximate cause of the accident." (App. A-11)

The cumulative effect of the Court of Appeals' error constitutes a denial of the Petitioners' Seventh Amendment right to a jury trial. The Court of Appeals ignored parts of the record, evaluated on its own other parts of the record, and misinterpreted the factual and legal theories presented to the jury. Its decision is not supported by any Pennsylvania case law and departs egregiously from this Court's long established doctrine limiting the appellate court's function in jury cases.

This case is appropriate for review by this Court because the Seventh Amendment is of little meaning if the

Courts of Appeals are free to insulate their review of a jury verdict by the simple expedient of stating the issue is a question of law.

2. THE PROPER APPLICATION OF RULE 50(d) BY THE COURT OF APPEALS INVOLVES SEVENTH AMENDMENT CONSIDERATION AND ONLY THIS COURT CAN INSURE THE INTEGRITY OF THE APPELLATE PROCESS.

Rule 50(d) authorizes the Court of Appeals when it reverses the judgment of a jury to direct a new trial or order the district court to determine if a new trial should be granted. As this Court stated in *Neely v. Martin K. Eby Const. Co.*, 386 U.S. 317 (1967):

> "It was, of course, incumbent on the Court of Appeals to consider the new trial question in light of its own experience with the case." 386 at 329-30.

The power conferred by Rule 50(d) is an important instrument of justice and a safeguard of a litigant's right to a jury trial. In this case the failure to employ that safeguard denied Petitioners their right to a jury trial.

Suppose a jury was charged on two counts of liability. Thereafter, it decided one in favor of a plaintiff but could not reach a verdict on the second. If the trial or appellate court granted a judgment notwithstanding the verdict, the plaintiff would then be entitled to a new trial on the unresolved.

The basic cause of action against Ford Motor Company was that the 1980 Ford Mustang with a manual transmission was an unreasonably dangerous product under Section 402A of the Restatement of Torts. Two theories were pleaded and tried: (1) was the car defectively designed because there was no neutral safety switch and, (2) if it was not defectively designed were the warnings inadequate in light of the risk. The two theories were interindependent.

Now the Court of Appeals has ruled that no charge should have been given on the warning issue. The Third Circuit has thereby foreclosed the Petitioners from trying their case on the single liability theory of whether the car was defectively designed because there was no neutral safety switch. The remedy for this denial of a jury trial was the granting of a new trial by the Third Circuit.

In *Neely* the Court of Appeals had not addressed the new trial issue in its Opinion, but this Court concluded;

> "[W]e will not assume the Court ignored its duty. . . .although it would have been better had its opinion expressly dealt with the new trial question." 386, U.S. at 330.

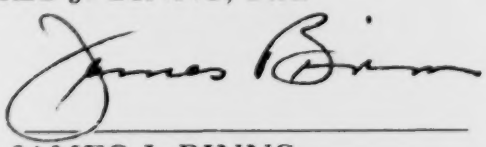
It is apparent from the Third Circuit's Opinion that no consideration could have been given to the Petitioners' entitlement to a new trial. Moreover, in this case the ground for a new trial arose only after the Third Circuit directed entry of the judgment notwithstanding the verdict.

CONCLUSION

For the reasons stated, the Court should grant Richard and Patricia Conti's Petition for a Writ of Certiorari and review the decision of the Third Circuit Court of Appeals.

Respectfully submitted,

JAMES J. BINNS, P.A.

By: 

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APPENDIX

CONTI, Patricia and Conti, Richard, husband and wife

v.

FORD MOTOR COMPANY and Winner Ford, J/S/A

v.

Richard CONTI.

Appeal of FORD MOTOR COMPANY.
No. 83-1792.

United States Court of Appeals,
Third Circuit.

Argued Aug. 10, 1984.
Decided Sept. 17, 1984.
As Amended Sept. 20, 1984.
Rehearing Denied Oct. 12, 1984.

OPINION OF THE COURT

JAMES HUNTER, III, Circuit Judge:

This appeal arises from a jury verdict in favor of appellees Patricia and Richard Conti and against appellant Ford Motor Company ("Ford"). The district court, 578 F.Supp. 1429, denied Ford's post-trial motions for a judgment notwithstanding the verdict and for a new trial. Because we conclude that the district court erred in not granting judgment in Ford's favor on the failure-to-warn theory, we reverse the district court's denial of Ford's motion for a judgment notwithstanding the verdict and remand for an order entering judgment on all claims in Ford's favor.

I.

Patricia Conti sustained serious injuries when, as she was in the process of entering a 1980 Ford Mustang on

the passenger side, her husband, appellee Richard Conti, turned the ignition key while the car was in gear without disengaging the clutch. Because the automobile was equipped with a standard transmission, Richard Conti's failure to disengage the clutch while starting the car in the reverse gear caused the car to lurch backwards. This lurching motion caused Patricia Conti to lose her balance and fall.

The Contis brought suit against Ford, seeking damages for Mrs. Conti's injuries sustained in the fall and for Mr. Conti's loss of consortium. Ford then joined Richard Conti as a third-party defendant, alleging that his negligence in starting the car while in gear and while the clutch was engaged was the cause-in-fact and proximate cause of Mrs. Conti's injuries, and thus that Ford was entitled to contribution from Mr. Conti.

The Contis' Complaint alleged that Ford was strictly liable for defective design and for failing to warn adequately of the dangers of starting a standard transmission car while in gear and while the clutch was engaged. The jury rejected the defective design claim, but found Ford liable on the failure-to-warn theory. The jury also found that Richard Conti was contributorially negligent, and that he was seventy-five percent responsible for the injuries suffered by Mrs. Conti. The jury awarded Mrs. Conti damages of $650,000 and Mr. Conti damages of $15,000, all against Ford.

The district court then entered judgment in favor of Mr. and Mrs. Conti for the amounts specified in the jury verdict. The district court also rejected Ford's arguments that Pennsylvania's comparative negligence and joint tortfeasors statutes accorded Ford the right of contribution from Mr. Conti, and thus entered judgment n.o.v. in favor of Mr. Conti on Ford's third-party claim. 42 Pa.Cons.Stat.Ann. §§7102, 8321 (Purdon's 1982).

II.

In seeking review of the judgment below, Ford has raised many issues for our consideration. These issues include the propriety of certain jury instructions given by the district court, whether Ford had a duty to warn of the allegedly obvious danger of starting a standard transmission car in gear while the clutch is engaged, whether Ford's Owner's Manual contained adequate warnings of this danger, whether the lack of an adequate warning was the proximate cause of Mrs. Conti's injuries, and whether Ford is entitled to contribution from Mr. Conti in light of the jury's finding that he was seventy-five percent responsible for the harm caused Mrs. Conti. Because we find that the district court erred in submitting the causation issue to the jury, however, we need not address all of these issues. Rather, we hold that Ford is entitled to judgment in its favor as a matter of law because the Contis have failed to prove that the existence of any additional warning may have forestalled Mr. Conti's "momentary inadvertence," App. at 357, in failing to disengage the clutch while starting the car in gear.

[1-3] The Pennsylvania courts have adopted section 402A of the Restatement (Second) of Torts, which imposes strict liability on the seller of any product "in a defective condition unreasonably dangerous to the user or consumer." *See, e.g., Incollingo v. Ewing*, 444 Pa. 263, 282 A.2d 206 (1971). Even if properly designed, a product may be in an unreasonably dangerous defective condition if its manufacturer fails to warn the user or consumer of latent dangers in the use or operation of the product. *See, e.g., Sherk v. Daisy-Heddon, A Division of Victor Comptometer Corporation*, 498 Pa. 594, 450 A.2d 615 (1982). Before strict liability will be imposed on a manufacturer for failure to warn adequately of latent dangers in the use of a product, however, the plaintiff must establish that the failure to warn adequately of such dan-

gers was the cause-in-fact and proximate cause of his or her injuries. *See, e.g., Greiner v. Volkswagenwerk Aktiengeselleschaft,* 540 F.2d 85 (3d Cir. 1976).

[4,5] Although the question of causation is normally for the jury, "if the relevant facts are not in dispute and the remoteness of the causal connection between the defendant's negligence and the plaintiff's injury clearly appears, the question becomes one of law." *Greiner,* 429 F.Supp. 495, 497 (E.D.Pa.1977), *on remand from* 540 F.2d 85 (3d Cir. 1976) (quoting *Liney v. Chestnut Motors, Inc.,* 421 Pa. 26, 29, 218 A.2d 336, 338 (1966)). Where the theory of liability is failure to warn adequately, the evidence must be such as to support a reasonable inference, rather than a guess, that the existence of an adequate warning may have prevented the accident before the issue of causation may be submitted to the jury.

III.

In the instant case, the Contis allege that Ford's failure to place a "reminder" warning in the car's interior resulted in Mr. Conti's negligent act in starting the standard transmission car while in the reverse gear and without disengaging the clutch. This negligent act then resulted in the backward movement of the car, which caused Mrs. Conti to lose her balance and fall, suffering injury. The district court submitted this issue of causation to the jury, which seemingly found that the lack of an adequate warning did result in Mrs. Conti's fall, thus rendering Ford strictly liable for the injuries suffered in the fall.

[6] We hold that the district court erred in submitting the causation issue to the jury and in not finding that the Contis had failed as a matter of law to show the connection between the existence of an adequate reminder warning and the possible prevention of the accident. As we read the record, there is no dispute as to the material facts. Mr. Conti was in his early forties at the

time of the accident. App. at 40. He had been driving standard transmission cars off and on since 1955. App. at 47. In fact, he had been in possession of the car involved in the accident for nine or ten months prior to the accident. App. at 25-26.

Mr. Conti had also read the Owner's Manual that came with the car, and which contained an instruction on pages 122-23 concerning operation of the car while in gear:

> On manual transmission vehicles, depress the clutch pedal and place the gear shift lever in the neutral position, as starter will operate while selector is in any gear.

App. at 184, 356. Mr. Conti testified that he could not remember reading this specific instruction, but that he knew that in "driving a standard transmission you would have to depress the clutch." App. at 46.

When questioned about the accident itself, and why he did not depress the clutch before he started the car, Mr. Conti testified: "I don't know why." App. at 46. Indeed, it is clear from the record that Mr. Conti was not paying attention to what he was doing when he started the car without disengaging the clutch. When asked to describe the accident, Mr. Conti stated:

> I was watching my wife walk around the front of the car. I reached over and opened the door. She was entering the car. Her one leg was suspended and *I was looking up talking to her* and I just reached over and started the car without depressing the clutch.

App. at 40 (emphasis added). The district court labeled this lack of attention by Mr. Conti "momentary inadvertence." App. at 357.

We find the evidence insufficient as a matter of law to support a reasonable inference that the existence of additional warnings may have prevented the accident from occurring. There is absolutely no evidence in the

record to suggest that Mr. Conti would have paid any greater attention to what he was doing when starting the car if additional warnings were contained in Ford's operator manual, or even if a sticker reminding the operator to disengage the clutch before starting the car in gear was prominently displayed in the interior of the car. Rather, the jury's conclusion was based on the mere speculation that if Mr. Conti's eyes had caught a sticker warning him to depress the clutch pedal as he was talking to his wife, he may have remembered to either shift the car to neutral or to disengage the clutch prior to starting the car. Ford cannot be held liable on a failure-to-warn theory merely because a jury concludes that more warnings are needed to remind drivers of the intricacies of standard transmissions. Rather, liability may result only when there is sufficient evidence that additional warnings or reminders may have made a difference. *See, e.g., Sherk v. Daisy-Heddon, A Division of Victor Comptometer Corporation*, 498 Pa. 594, 450 A.2d 615 (1982).

Finally, we note that our conclusion is supported by the jury's findings that Mr. Conti's negligence was seventy-five percent responsible for Mrs. Conti's injuries, and that the car involved was not defectively designed. Indeed, the sole basis of liability accepted by the jury seemed to be that Ford was liable for not placing additional reminder warnings in the car's interior. As stated above, however, because there is insufficient evidence in the record to support a reasonable inference that additional reminders may have forestalled Mr. Conti's negligence, the issue of causation should not have been submitted to the jury. Thus, we reverse the judgment below and remand for an order granting judgment in Ford's favor on all claims.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1792

PATRICIA CONTI and RICHARD CONTI,
husband and wife,
Petitioners

vs.

FORD MOTOR COMPANY,
and WINNER FORD J/S/A

vs.

RICHARD CONTI

Ford Motor Company, *Appellant*

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, *Circuit Judges*

The petition for rehearing filed by

APPELLEES, RICHARD CONTI
and PATRICIA CONTI

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in

regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

_____

Judge

Dated: October 12, 1984

Patricia CONTI and Richard Conti

v.

FORD MOTOR COMPANY

v.

Richard CONTI, Third-Party Defendant.
Civ. A. No. 81-2158.

United States District Court,
E.D. Pennsylvania.

Sept. 23, 1983.

MEMORANDUM AND ORDER

FULLAM, District Judge.

The wife-plaintiff, Patricia Conti, was seriously injured when, as she was in the process of entering, on the passenger side, a Ford automobile being driven by her husband, the plaintiff, Richard Conti, the vehicle suddenly and unexpectedly moved backward, throwing her to the ground. Contending that the accident was caused by a defective condition of the automobile, plaintiffs brought this action against the Ford Motor Company; the case went to trial solely on the issue of strict liability

under §402A Restatement (Second) Torts. The defendant caused a severance of the husband-plaintiff's claims, and joined him as a third-party defendant, on a negligence theory.

The automobile was equipped with a standard transmission, rather than an automatic transmission. In cars equipped with automatic transmissions, and also in standard-transmission cars manufactured by General Motors (and, until fairly recently, cars manufactured by Chrysler Corporation), it is impossible to start the engine while the transmission is engaged. But all Ford standard-transmission automobiles (as well as most foreign-make standard-transmission vehicles) lack a cutoff switch which would prevent activation of the starter while the clutch is engaged. If the starter is activated while the car is in gear, there are two possibilities: that the starter motor itself will cause the car to move; or, as occurred in this case, that activation of the starter will also start the engine of the car, which will then propel the vehicle.

The Ford automobile involved in this case was owned by the plaintiffs, and was customarily operated by the wife-plaintiff. The husband-plaintiff more frequently drove a van which was equipped with automatic transmission. On the occasion in question, the husband-plaintiff was about to drive his wife to visit a sick relative. The car had been parked in the plaintiffs' driveway, with the gear shift lever in reverse. As wife-plaintiff was entering the car, husband-plaintiff turned the ignition key to start the engine, but neglected to depress the clutch. The engine started, moving the car suddenly backward some five or six feet at which point husband-plaintiff succeeded in stopping the vehicle; unfortunately, the movement caused serious injuries to wife-plaintiff.

Plaintiffs presented the jury with two possible bases for imposing §402A liability upon Ford Motor Company: (1) that the vehicle was defective and unreasonably dangerous in its design, because of the absence of a cutoff device which would have made it impossible to start the

engine while the car was in gear, unless the clutch were depressed; and (2) that the defendant failed adequately to warn users of the dangers involved in attempting to start the engine with the car in gear. The jury's answers to special interrogatories imposed liability only on the failure-to-warn theory. The defendant's post-trial motions now before the court seek, *inter alia*, judgment n.o.v. on the ground that, as a matter of law, the warnings were adequate, and, in any event, any deficiency in the warnings was not a proximate cause of the accident.

The operator's manual provided by the manufacturer is a lengthy and detailed booklet. It contains approximately 81 warnings and cautions, in bold-face print, concerning various features of the vehicle. None of these warnings relate to the characteristic involved in this accident. The only relevant entry appears at pages 122-23 of the manual, in an inconspicuous portion of the text, and reads as follows:

> "On manual transmission vehicles, depress the clutch pedal and place the gear shift lever in the neutral position, as starter will operate while selector is in any gear."

It should be noted that this instruction concerning the proper method of starting the car does not, except perhaps by implication, alert the reader to the dangers involved if the start-up instructions are not precisely followed. It should also be noted that, elsewhere in the manual, the operator is warned not to rely exclusively upon the emergency brake when the vehicle is left unattended; instead, the operator is advised to park the car with the gear shift lever in reverse.

[1] In my view, the evidence clearly sufficed to permit the jury to conclude that the warnings given by the defendant were inadequate. It is significant that, in addition to answering the special interrogatories, the jury added the following comment:

> "We, the members of the jury, sincerely recommend that Ford Motor Company should install inside the cab of their cars warnings and/or cautions stressing the possible dangers of not following the operator's instructions exactly. Also, it should put more warnings and/or cautions in the operator's manual."

The evidence was also clearly sufficient to support the jury's finding that the absence of adequate warnings was a proximate cause of the accident. The husband-plaintiff did testify that he had read the operator's manual, and was generally aware that he should have depressed the clutch before attempting to start the engine of a stick-shift car; but, until this accident, he was totally unaware of the possibility that the engine would start and propel the car in such circumstances. In its entirety, the husband's testimony leads one to conclude that he was guilty of momentary inadvertence, either in forgetting that the car had a stick-shift, or in overlooking the necessity of depressing the clutch before turning the ignition key. It was not unreasonable for the jury to conclude that the accident would not have occurred if the manufacturer had provided warnings adequate to alert the operator to the dangers involved. While it is probably true that most persons familiar with stick-shift automobiles are aware that such vehicles can be caused to move by activating the starter alone, it cannot be ruled as a matter of law that all operators are chargeable with knowledge that the motor will start under such circumstances, and "really" move the vehicle rapidly and substantially. Moreover, there was evidence to the effect that approximately 90% of all automobiles on America's highways today are equipped with automatic transmissions. The jury might well have concluded that it was inappropriate for the manufacturer to assume widespread familiarity with stick-shift transmissions. The husband-plaintiff was not, under the evidence, consciously testing a known dan-

ger, nor was his momentary inadvertence unforeseeable, so as to constitute superseding negligence. The jury's finding of proximate cause cannot properly be disturbed.

[2, 3] I have considered the various contentions urged in support of a new trial, but have concluded that the issues were fairly and properly presented to the jury, whose decision must stand. I perceive no error in permitting the jury to view a filmed re-enactment of the start-up of the vehicle; this was merely helpful demonstrative evidence, and the differences between the re-enactment and the actual accident were clearly and repeatedly explained. If the jury accepted the testimony of plaintiffs and their medical witnesses, as the jury obviously did, the verdict was not notably excessive. The evidence tended to establish that, as a result of her injuries, the wife-plaintiff suffered a neurogenic bladder, resulting in complete and permanent loss of urinary control, necessitating self-catheterization six or seven times per day and night, for the rest of her life. The jury's award of $650,000 was perhaps generous, but not so excessive as to warrant judicial intervention.

[4] A principal thrust of defendant's post-trial motions and, in my view, the only substantial issue remaining in this case, relates to the possible application of Pennsylvania's comparative negligence statute and/or the statute providing for contribution among joint tortfeasors. *See* 42 Pa. Cons.Stat.Ann. §§7102 (comparative negligence), 8324 (joint tortfeasors) (Purdon Supp.1982). As noted above, the liability of the defendant was predicated solely upon §402A of the Restatement (Second) Torts, but defendant asserted a third-party complaint against the husband-plaintiff, alleging that he was negligent and that his negligence was a proximate cause of the accident and injury. Because of uncertainty concerning the applicability of the comparative negligence and joint tortfeasors statutes in the product-liability context, and in order to establish a factual predicate for a later determination of these issues, it was agreed by all concerned

that the jury should be asked to determine the "percentage of causation" as between the defendant and the husband as third-party defendant. In addition to imposing 402A liability on the defendant, the jury further found that the husband was guilty of negligence, and that his negligence represented 75% of the cause of the accident; the jury assigned 25% of the causation to the defendant manufacturer. Shortly after the conclusion of the trial, I filed a brief Memorandum reflecting my tentative conclusion that the Pennsylvania Supreme Court would probably not invoke the comparative negligence doctrine in product-liability cases. Thus, judgment was entered in favor of both plaintiffs for the full amounts of the jury's awards, and judgment n.o.v. was entered in favor of the husband on the third-party complaint. The defendant's motions now seek reconsideration of the comparative negligence issue, and assert, alternatively, that contribution should be permitted.

The defendant correctly argues that the comparative negligence doctrine is now invoked in product-liability cases in many jurisdictions. See, *e.g.*, *Brinkerhoff v. Swearingen Aviation Corp.*, 663 P.2d 937 (Alaska 1983); *Duncan v. Cessna Aircraft Co.*, No. C-1443 (Tex. July 13, 1983). See also *Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co.*, 565 F.2d 1129 (9th Cir. 1979) (federal admiralty jurisdiction); *Safeway Stores, Inc. v. Nest-Kart*, 21 Cal.3d 322, 579 P.2d 441, 146 Cal. Rptr. 550 (1978); *West v. Caterpillar Tractor, Inc.*, 336 So.2d 80 (Fla.1976); *Kaneko v. Hilo Coast Processing*, 654 P.2d 343 (Haw.1982); *Dippel v. Sciano*, 37 Wis.2d 443, 155 N.W.2d 55 (1967). It is fair to state, however, that most of these decisions derive from the premise that strict product-liability is akin to "negligence *per se*" or some similar form of "fault". Some courts have based such decisions on the conclusion that such "fault" is within the reach of the comparative negligence statute enacted by

the legislature, while other courts, recognizing that the statute does not apply, reach the same result by a judicially created analogous rule.

The principal authority relied upon by the defendant is the decision of our Court of Appeals in *Murray v. Fairbanks Morse*, 610 F.2d 149 (3d Cir.1979). In a comprehensive and scholarly opinion by Judge Rosenn, the court there held that the Virgin Islands comparative negligence statute was properly applicable to products-liability cases under the law of the Virgin Islands.[1] There are, however, several reasons which persuade me that the *Murray* decision is not a reliable indicator of the direction of the likely development of Pennsylvania law.

In the first place, the *Murray* court was dealing with a different comparative negligence statute. The Virgin Islands statute specifically excepted from its operation cases involving absolute liability. *See* V.I. Code Ann. Tit. 5, §1451(b) (Supp.1982). The Third Circuit was able to conclude from this that the legislature did not intend to remove from the statute's operation cases involving mere strict liability, as opposed to absolute liability. The Pennsylvania comparative negligence statute, on the other hand, contains no exceptions clause, and simply does not lend itself to the same kind of analysis. *See* 42 Pa.Cons.Stat.Ann. §7102 (Purdon Supp.1982).

There are, however, factors common to both the Virgin Islands and Pennsylvania, and, indeed, to most jurisdictions, which tend to support defendant's argument that the *Murray* holding should be equally applicable un-

1. Initially, the defendant also cited the opinion of a panel of the Pennsylvania Superior Court in *Dambacher v. Mallis*, No. 1725/82 (Pa.Super.Ct. June 17, 1983), which seemingly upheld a lower court decision awarding contribution in a products-liability case on the basis of the Pennsylvania comparative negligence statute. That opinion has since been effectively withdrawn, by the grant of reargument on August 23, 1983. Moreover, it is not at all clear that the panel had actually focused upon the issues under discussion in the present case.

der Pennsylvania law. In both jurisdictions, when strict product-liability under §402A was first incorporated into the law of that jurisdiction, contributory negligence was an absolute bar to recovery in negligence actions. It was made clear that, under §402A, contributory negligence of the user of the product would not prevent recovery on strict-liability grounds. Thereafter, the contributory negligence doctrine was legislatively moderated by enactment of a comparative negligence statute. The question became, and remains, whether this change in the law of contributory negligence justifies re-examination of the question whether contributory negligence should not now be partially re-admitted as a defense in product-liability cases.

In diversity cases such as this one, the role of a federal court is to predict the answer which would be given by the Pennsylvania Supreme Court to these questions. Would the Pennsylvania Supreme Court construe the Pennsylvania comparative negligence statute as applicable in the products liability context? If not, would the Pennsylvania Supreme Court consider the comparative negligence statute a sufficient justification for formulating and applying an analogous modification of §402A law? It must be remembered that a federal appellate court has a somewhat greater role in the developing law of the Virgin Islands than in the developing law of Pennsylvania. The *Murray* decision makes it quite clear that the Third Circuit Court of Appeals views comparative fault as the preferable rule in product-liability cases, but this court is not free to follow that lead if it represents a departure from the discernible trend of Pennsylvania decisions.

Like the Virgin Islands statute, the Pennsylvania Comparative Negligence Act applies only in "actions brought to recover damages for *negligence*. . . ." 42 Pa.Cons.Stat.Ann. §7102(a) (Purdon Supp. 1982). The two statutes differ, as mentioned above, in the fact that the Virgin Islands statute contains a section stating that the statute "does not apply to any action based upon a

statute the violation of which imposes absolute liability, whether or not such statute comprehends negligent conduct." V.I.Code Ann. Tit. 5, §1451(b) (Supp.1982). And the Pennsylvania statute is more explicit in stating that what is to be compared is the "causal *negligence*" of the parties. 42 Pa.Cons.Stat.Ann. §7102(a) (Purdon Supp. 1982). The Pennsylvania Supreme Court, perhaps more than any other state appellate court in the nation, has been emphatic in divorcing negligence concepts from product-liability doctrine. *See, e.g., Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975); *Azzarello v. Black Brothers Co., Inc.*, 480 Pa. 547, 391 A.2d 1020 (1978). As the Court of Appeals has noted,

> "We read *Azzarello* as a signal that evidence and jury instructions regarding negligence concepts should be kept out of cases brought under §402A." *Holloway v. J.B. Systems, Ltd.*, 609 F.2d 1069, 1973 (3d Cir.1979) (footnote omitted).

In my view, it is extremely unlikely that the Pennsylvania Supreme Court would hold that the comparative negligence statute directly governs product liability cases; that is, I believe it unlikely that, given *Azzarello*, that court would hold that the liability of a manufacturer for a defective product is equivalent to "causal negligence" which is to be apportioned under the statute.

It is nevertheless perhaps arguable that the Pennsylvania Supreme Court might yet conclude that passage of the Comparative Negligence Act justifies modification of the established rule that contributory negligence (as distinguished from voluntary assumption of the risk) is irrelevant in product-liability cases. On that issue, the sign posts are, arguably at least, less legible. In *Rutter v. Northeastern Beaver County School District*, 496 Pa. 590, 437 A.2d 1198 (1981), the Pennsylvania Supreme Court voted 4 to 3 to reverse a lower court decision which had granted a compulsory non-suit on the ground of voluntary assumption of the risk. Three of the four justices

joined in an opinion which would have totally abolished the doctrine of assumption of risk in Pennsylvania as counter-productive and unnecessary in view of the enactment of the Comparative Negligence Act, while retaining the doctrine of assumption of risk in product-liability cases under §402A. A fourth justice concurred in the result, but did not join in the plurality opinion. Of the dissenting justices, one found it unnecessary to reach the assumption-of-risk issue, another believed the doctrine should be retained in all cases, and the third dissenter joined in both of the other dissenting opinions.

While the ultimate fate of the assumption-of-risk doctrine in Pennsylvania is not of present concern, the *Rutter* case is important to the present decision: It is clear that at least three, and perhaps a majority, of the members of the Pennsylvania Supreme Court hold the view that the comparative negligence statute satisfactorily answers all questions of relative fault in negligence cases; but they would retain the assumption-of-risk doctrine in §402A cases. In my view, this constitutes a strong signal that the court would not apply comparative fault or its equivalent in product-liability cases.

[5] At the very least, I am satisfied that a judicially imposed doctrine of comparative fault (or comparative degree of causation) in product-liability cases would represent a significant departure from the present law of Pennsylvania, not within the province of a federal court exercising diversity jurisdiction.

Finally, and quite apart from the restrictions imposed by this court's merely predictive role, I note that it is far from clear that the *Murray* decision would require the result sought by defendant in this case. In *Murray*, and in most if not all of the cases applying comparative fault or comparative causation in product-liability cases, the courts were dealing with what might be termed independent or additional negligence on the part of the user of the defective product; that is, negligence other than mere failure to learn of, and guard against, the defect

alleged. In *Murray*, for example, there was evidence that the plaintiff was pursuing a dangerous method of installing the equipment in question, and was not exercising reasonable care for his own safety, in ways totally unrelated to the inadequate welds which rendered the product defectively dangerous. Notwithstanding the generality of the language in the *Murray* opinion, it is reasonable to suppose that the court might reach a different conclusion in a case, for example, where the operator of a vehicle is traveling at grossly excessive speeds when the wheel falls off, than in a case in which the operator merely was negligent in failing to inspect the wheel and observe that its fastenings were inadequate. And the concurrent negligence of a third party, such as an employer who fails to supply guarding omitted by the manufacturer, falls more comfortably within the comparative-fault realm than the negligence of a user of the product, when his negligence consists of failure to discover the defect or to avoid the harm. Invocation of the comparative-fault doctrine in the latter situation would severely undermine the policies served by §402A strict liability.

[6] For all of these reasons, I have concluded that comparative-fault doctrine has no place in this litigation. For the same reasons, and also because the strict liability of the manufacturer is not on the same legal plane as the negligence of the user, *see Rhoads v. Ford Motor Co.*, 374 F.Supp. 1317, 1320 (W.D.Pa.1974), *aff'd on other grounds*, 514 F.2d 931 (3d Cir.1975), the Joint Tortfeasors Act is inapplicable here.

I therefore conclude that judgment was properly entered in favor of both plaintiffs in the full amounts awarded them by the jury, and that judgment was properly entered against the manufacturer on its third-party claim. In view of these conclusions, it is unnecessary to consider whether the jury's assessment of relative causation finds adequate support in the evidentiary record.

RICHARD CONTI, sworn.

DIRECT EXAMINATION

BY MR. BINNS:

Q Mr. Conti, what is your age, sir?

A 45.

Q Are you married to Patricia Conti?

A Yes, sir.

Q For how long?

A Almost 20 years.

Q Where do you reside?

A 718 Crum Creek Road in Broomall, Pennsylvania.

Q Were you the operator of a 1980 Ford Mustang on November 11, 1980?

A Yes, sir.

Q Tell the jury what happened that day.

A We were going to visit my mother in a nursing home and I happened to get in the car first. I was watching my wife walk around the front of the car. I reached over and opened the door. She was entering the car. Her one leg was suspended and I was looking up talking to her and I just reached over and started the car without depressing the clutch. The car hit her, the front door hit her into the back post. She fell under the car. If I don't quick stop the car I run over her. Her leg —

Q Did you stop the car?

A Yes, sir.

THE COURT: It may be implicit in your answer but was the car moving backward or forward at that time?

THE WITNESS: Backward, sir.

BY MR. BINNS:

Q Now, had you parked the car in reverse prior to that time that you started?

A I didn't this particular time but we always do park it in reverse. The manual tells you to park it in reverse.

Q What did you then do with respect to your wife?

A Well, I believe, if you can understand what kind of shock I was in, I believe — my mother-in-law had just closed the door. She was like waving good-by to us. I believe she didn't see us leave. So she looked out and I said, "Call a doctor, Pat fell down." I don't know what I said just to hold her from getting hysterical and I pulled gently Pat from under the car, tried as best I could to pick her up, put her in the car and I drove her around to our family doctor which is only on the other side of the road there right around the corner.

Q Did the doctor see her?

A Yes, sir. He was out on the porch waiting for us and he walked over and he gave us an examination with his hands and he said immediately take her to the hospital for x-rays.

Q And you did that?

A Yes, sir.

Q All right, now, Mr. Conti, getting back to the happening of this incident, do you drive an automatic transmission car in addition to the stick shift car?

A Yes.

Q What is your procedure for starting the automatic car?

A You get in, turn the key on.

Q Had this type of incident ever occurred to you before when you drove this or a standard transmission?

A No, sir.

MR. BINNS: No further questions.

CROSS-EXAMINATION

BY MR. PINTO:

Q Now, Mr. Conti, when did you buy this car?

A I believe in November of '80 — we ordered it, I believe, in November of '80.

Q And when did it come into your possession?

A I am sorry, November of '79 and —

Q The accident happened in November of '80, correct?

A Yes.

Q And you bought it a year before that?

THE COURT: Approximately.

THE WITNESS: Yes, approximately.

BY MR. PINTO:

Q You ordered it a year before that and it took a while for the car to be delivered. So you came in possession of it early in 1980; isn't that right?

A I believe it was February of 1980.

Q All right. So you owned the car you say January?

A I believe it was February.

THE COURT: February.

MR. PINTO: February, excuse me.

BY MR. PINTO:

Q So you owned the car nine or ten months before the accident?

A Yes, sir.

SIDE BAR OMITTED

BY MR. PINTO:

Q Now, I believe you also testified you drove a car that had automatic transmission?

A That is correct.

Q Whose car was that?

A The company car.

Q The company you worked for?

Q Yes.

Q What kind of a car?

A Well, at that particular time it was a van, now it is a station wagon.

Q I am not talking about now, just before this incident occurred.

A A van.

Q It had automatic transmission?

A Yes, sir.

Q Didn't you also about that time drive a GM truck or previous to that time in your business that had standard transmission?

A Yes.

Q And in that GM truck it had the standard transmission, didn't you have to depress the clutch before the car would start?

A Yes.

Q And when you got in this Ford Mustang you knew it was a standard transmission, didn't you?

A Yes.

Q Why didn't you depress the clutch before you started it?

A I don't know why.

Q Isn't it a fact that you reviewed this owner's manual when you bought the car?

A Yes.

Q As a matter of fact, you knew from the owner's manual that the reverse gear acted as the parking gear for the vehicle?

A Correct.

Q And when you parked it you would put it in reverse gear?

A Yes.

Q And didn't the owner's manual also tell you that you should depress the clutch when you start the vehicle?

A I believe — I don't know if I specifically read that but I know work, driving a standard transmission you would have to depress the clutch.

Q And —

A If you didn't depress the clutch it wouldn't start.

Q General Motors car?

A Well, any car that I have ever driven.

Q Well, didn't you once drive a car when you were a young man that had standard transmission where the engine would turn over if you didn't depress the clutch?

A Not without engaging the clutch. You have to let the clutch out — you mean to inch it over if something happened to the car?

Q Sure.

A You had to engage the clutch.

Q You had to engage the clutch?

A Yes, I believe so. That it was 1955 to my recollection. I believe you had to engage the clutch. You had to sort of pop the clutch.

Q You couldn't start the car in 1955 without engaging the clutch?

A I don't believe so.

Q Let me tell you the evidence will show that it wasn't until the 1970's that General Motors put that on their cars and before that all the General Motors cars as well as —

THE COURT: I don't think this is a question. I don't think it is cross-examination. You may ask the witness.

MR. PINTO: Well, I am going to present the evidence, Your Honor.

THE COURT: That is fine. Don't tell the witness all about what you are going to do. Do you have a question of the witness?

BY MR. PINTO:

Q All right, Mr. Conti —

A Yes, sir.

Q — it is still your position that you couldn't start the standard transmission vehicle you had back in the '50's without depressing the clutch. Is that correct?

A I believe — to the best of my recollection, that is quite a few years ago.

Q But you knew back then that you could, if your car became disabled, utilize your transmission and your starter to move the vehicle out of a place of danger if you stalled it?

A Yes, I believe so.

THE COURT: I wonder if I could just ask a couple of questions because it seems to me we are using the

term start the car in perhaps two different ways. Maybe counsel in their questions could clarify this.

It is one thing to say that the starter motor will not turn over. It is another thing to say that the engine will not actually begin to function and it is possible there could be a distinction.

MR. PINTO: Well, I am not sure this witness is qualified to respond to that. I think the engineers will, Your Honor.

THE COURT: I just hope sometime before the case is over that will be clarified.

MR. PINTO: It certainly will, Your Honor.

THE COURT: Okay.

BY MR. PINTO:

Q Weren't you under the impression just before this accident that all standard transmission vehicles had to have their clutches depressed before the engine would turn over and start?

A Yes.

MR. PINTO: That is all I have. Thank you.

THE COURT: Anything further?

MR. BINNS: No, sir.

THE COURT: You may step down. Thank you, sir.